Supreme Court, U.S.
FILED

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No. ——

In the Supreme Court of the United States

HAMILTON COUNTY DEPARTMENT OF ADULT PROBATION; MICHAEL L. WALTON, Chief Probation Officer,

Petitioners,

v.

GERALD CASH; CLARA CASH; GREGORY B. WAHOFF; PHILLIP GARCIA, and ROCKY WAYNE ADKISSON,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a county municipal government may be held responsible under 42 U.S.C. §1983 for participating in a lawful seizure of property that may have been ultimately unlawfully destroyed by another, unaffiliated governmental agency.

PARTIES TO THE PROCEEDING

Petitioners are the Hamilton County (Ohio) Department of Adult Probation and Michael L. Walton, Chief Probation Officer.

Respondents are Gerald Cash, Clara Cash,[1] Gregory B. Wahoff, Phillip Garcia, and Rocky Wayne Adkisson.

In addition to these parties, the City of Cincinnati, Ohio was also a party to the proceedings below.

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[1] Gerald and Clara Cash were killed in a fire during the course of the appeal to the Sixth Circuit. A suggestion of death was filed. No estate for either of the Cashes was opened or substituted as a party to the proceeding below.

RULE 29.6 STATEMENT

Petitioners are not required to file a Rule 29.6 Statement.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Hamilton County Department of Adult Probation and Michael L. Walton, Chief Probation Officer, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the United States District Court for the Sixth Circuit is published at 388 F.3d 539 (6th Cir. 2004) (Pet. App. B). A petition for rehearing and rehearing *en banc* was denied without published opinion on February 25, 2005. The unpublished order appears electronically at 2005 U.S. App. LEXIS 3840 (6t Cir. Feb. 25, 2005). (Pet. App. A).

The order of the United States District Court for the Southern District of Ohio - Western Division granting summary judgment to petitioners was not published. (Pet. App. C).

JURISDICTION

The United States Sixth Circuit court of Appeals issued its opinion on November 12, 2004 and its order denying rehearing on February 25, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Section 1983 of the Civil Rights Act of 1871 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity ...

Ohio Revised Code Sections 723.01 and 2744.02 are also referenced in this Petition. These sections deal with the responsibility of municipal corporations to keep public thoroughfares open and free from nuisance. The sections as they existed on the date Respondents' Complaint was originally filed are set out verbatim below.

> ORC Ann. 723.01 (Anderson 2001)
>
> §§ 723.01 Legislative authority to have care, supervision, and control of streets.
>
> Municipal corporations shall have special power to regulate the use of the streets. Except as provided in section 5501.49 of the Revised Code, the legislative authority of a municipal corporation shall have the care, supervision, and control of the public highways, streets, avenues, alleys, sidewalks, public grounds, bridges, aqueducts, and viaducts within the municipal corporation, and the municipal corporation shall cause them to be kept open, in repair, and free from nuisance.
> **HISTORY:** : Bates §§§§ 1536-102, 1536-131; 96 v 26, §§ 9; 96 v 31, §§ 28; GC §§ 3714; Bureau of Code Revision, 10-1-53; 141 v H 176 (Eff 11-20-85);

143 v H 381 (Eff 7-1-89); 146 v H 350 (Eff 1-27-97); 149 v S 108, §§ 2.01. Eff 7-6-2001.

ORC Ann. 2744.02 (Anderson 2001)

§§ 2744.02 Classification of functions of political subdivisions; liability; exceptions.

(A)(1) For the purposes of this chapter, the functions of political subdivisions are hereby classified as governmental functions and proprietary functions. Except as provided in division (B) of this section, a political subdivision is not liable in damages in a civil action for injury, death, or loss to person or property allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function.

(2) Subject to statutory limitations upon their monetary jurisdiction, the courts of common pleas, the municipal courts, and the county courts have jurisdiction to hear and determine civil actions governed by or brought pursuant to this chapter.

(B) Subject to sections 2744.03 and 2744.05 of the Revised Code, a political subdivision is liable in damages in a civil action for injury, death, or loss to person or property allegedly caused by an act or omission of the political subdivision or of any of its employees in connection with a governmental or proprietary function, as follows:

(1) Except as otherwise provided in this division, political subdivisions are liable for injury, death, or loss to person or property caused by the negligent operation of any motor vehicle by their employees upon the public roads, highways, or streets when the

employees are engaged within the scope of their employment and authority. The following are full defenses to that liability:

(a) A member of a municipal corporation police department or any other police agency was operating a motor vehicle while responding to an emergency call and the operation of the vehicle did not constitute willful or wanton misconduct;

(b) A member of a municipal corporation fire department or any other firefighting agency was operating a motor vehicle while engaged in duty at a fire, proceeding toward a place where a fire is in progress or is believed to be in progress, or answering any other emergency alarm and the operation of the vehicle did not constitute willful or wanton misconduct;

(c) A member of an emergency medical service owned or operated by a political subdivision was operating a motor vehicle while responding to or completing a call for emergency medical care or treatment, the member was holding a valid commercial driver's license issued pursuant to Chapter 4506. or a driver's license issued pursuant to Chapter 4507. of the Revised Code, the operation of the vehicle did not constitute willful or wanton misconduct, and the operation complies with the precautions of section 4511.03 of the Revised Code.

(2) Except as otherwise provided in sections 3314.07 and 3746.24 of the Revised Code, political subdivisions are liable for injury, death, or loss to person or property caused by the negligent performance of acts by their employees with respect to proprietary functions of the political subdivisions.

(3) Except as otherwise provided in section 3746.24 of the Revised Code, political subdivisions are liable for

injury, death, or loss to person or property caused by their failure to keep public roads, highways, streets, avenues, alleys, sidewalks, bridges, aqueducts, viaducts, or public grounds within the political subdivisions open, in repair, and free from nuisance, except that it is a full defense to that liability, when a bridge within a municipal corporation is involved, that the municipal corporation does not have the responsibility for maintaining or inspecting the bridge.

(4) Except as otherwise provided in section 3746.24 of the Revised Code, political subdivisions are liable for injury, death, or loss to person or property that is caused by the negligence of their employees and that occurs within or on the grounds of buildings that are used in connection with the performance of a governmental function, including, but not limited to, office buildings and courthouses, but not including jails, places of juvenile detention, workhouses, or any other detention facility, as defined in section 2921.01 of the Revised Code.

(5) In addition to the circumstances described in divisions (B)(1) to (4) of this section, a political subdivision is liable for injury, death, or loss to person or property when liability is expressly imposed upon the political subdivision by a section of the Revised Code, including, but not limited to, sections 2743.02 and 5591.37 of the Revised Code. Liability shall not be construed to exist under another section of the Revised Code merely because a responsibility is imposed upon a political subdivision or because of a general authorization that a political subdivision may sue and be sued.

HISTORY: : 141 v H 176 (Eff 11-20-85); 143 v H 381 (Eff 7-1-89); 145 v S 221 (Eff 9-28-94); 146 v H

350 (Eff 1-27-97); 147 v H 215 (Eff 6-30-97); 149 v S 108, §§ 2.01. Eff 7-6-2001.

STATEMENT OF THE CASE

A. Factual Background

Respondents are persons claiming to be homeless who persistently trespass without any claim of right upon public property in the City of Cincinnati. While there, they leave accumulations of refuse and personal items unattended an without identification in areas where access is prohibited by state law. In response to two deaths that occurred several years ago in "homeless camps," as well as to continuing problems of crime, litter and garbage accumulation, and citizen complaints, the City of Cincinnati Police Division, in conjunction with the city sanitation department, developed a plan to address the ongoing problem of these "camps." Respondents' camps were located on access restricted public property in the City of Cincinnati within the right of way of an interstate highway. Pedestrian access to this area is prohibited. The substance of Respondents' claim challenges cleanups that occurred in September and October of 2001 conducted under the supervision of Cincinnati police officers using work crews from the Hamilton County Department of Adult Probation composed of probationers performing community service as part of their criminal sentence. Respondents claim that various items of personal property were seized and subsequently destroyed by the City of Cincinnati without notice and hearing. Respondents are concerned only with the destruction of their property and do not challenge the lawfulness of the seizure.

The City of Cincinnati and the Board of Commissioners of Hamilton County are parties to an agreement whereby the

Hamilton County Department of Adult Probation provides services to the City for purposes related to, "general litter collection and ground maintenance of city-owned lots through the City of Cincinnati area and as directed by the Neighborhood Operations Division of the City of Cincinnati." Aware of this agreement, a Cincinnati police officer, Thomas Prem, approached the Adult Probation Department to schedule community service work crews to assist in the clean-up of the areas from which Respondents claim their property was removed and destroyed.

Officer Prem would determine which sites would be cleaned two to three days in advance of the actual exercise. He would plan the cleaning and coordinate with Adult Probation and the Sanitation crews and would visit the sites beforehand and determine if cleaning was necessary. In the event that persons were present when he did this site analysis, Prem would tell them that the cleaning crews were coming, that they needed to get their valuables out, and that anything remaining would be removed. On the day that the sites were cleaned, if persons were present, they were informed why the police were there, the locations of homeless shelters in the area, that they had the right to take anything personal with them, and that they needed to leave the premises because the locations were restricted from that type of use. Persons present on the day of the cleaning were given time to remove their belongings and, if needed, were given bags in which to transport their items of personal property.

The probation crews went to the sites as directed by the Cincinnati Police Division. While there, they were directed in their efforts solely by the Cincinnati police officer on the scene. Prior to cleaning the area, the probationers were instructed to bring any items of value to the police or the probationers' supervisors. Items that were readily identifiable

as personal property that had some value were removed from the premises and returned to the owner, if the owner could be readily ascertained, or logged as "found property" at Cincinnati Police District 1 and sent to the police property room. The Cincinnati Police Division policy mandates that found property be retained for one year. Material determined to be trash, litter, or other refuse was placed in bags by the probationers and hauled away by the sanitation department.

Several of the Respondents made some effort to locate their personal belongings by calling around to different agencies. None, however, went to the police property room to examine property that had been logged in and stored there during the relevant time period. Counsel for Respondents, following substantial discovery and the filing of the defendants' motions for summary judgment, did appear at the property room and after only examining the written inventory of the property stored there, submitted an affidavit in opposition to the motions claiming that none of Respondents' property appears on the logs.

B. Proceedings below

During the course of proceedings below, Respondents specifically abandoned all claims related to the seizure of their property and elected to proceed solely with respect to its claimed destruction by the City of Cincinnati, stating:

> Plaintiffs do not contend that the Defendants had to conduct a hearing before they removed the Plaintiffs' possessions from public land. However, it is plain that before the City *destroyed* the property it could have and should have, pursuant to Constitutional mandates, conducted a hearing. Failure to do so

plainly subjects them to liability pursuant to 42 U.S.C. § 1983. (Pet. App. C at 19a)(emphasis original).

In granting summary judgment to all defendants the district court determined that the destruction of Respondents' property, if it occurred at all, occurred either at the scene of the cleanup or at some point after it was removed to the police property room. (Pet. App. C at 22a). The district court then determined that any on-site destruction, whether negligently or intentionally done by the probationers removing the property, was random and unauthorized and therefore governed by this Court's decisions in *Parrat v. Taylor,* 451 U.S. 527, 101 S.Ct. 1908, 68 L. Ed.2d. 420 (1981), and *Hudson v. Palmer,* 468 U.S. 517, 104 S.Ct. 3194; 82 L.Ed.2d. 393, (1984). (Pet. App. C at 22a). With respect to any property that may have been removed to the police property room, the district court observed that it was doubtful that Respondents created any issue of material fact regarding the destruction of their property due to "substantial overlap" between the items claimed by Respondents to have been seized, and the description of items logged into the property room during the relevant time period. (Pet. App. C at 23a).

In reversing the district court's grant of summary judgment to the Hamilton County Department of Adult Probation and its Chief Probation Officer, the Sixth Circuit determined that Respondents had presented "substantial evidence" sufficient to establish a custom of destroying Respondents' unattended property at the sites in question. (Pet. App. B at 10a). In so finding, the court did not differentiate between the acts of the City of Cincinnati and those of the Department of Adult Probation. Nor did it point to any evidence that the policy makers of the respective governments were aware of this custom of destroying the property of Respondents. In holding that " a genuine issue

of material fact exists as to whether the property of homeless persons like the plaintiffs was being discarded as part of the City's official policy," the court then inexplicably reversed the grant of summary judgment as to both the City of Cincinnati and the Petitioners. (Pet. App. B at 11a). The defendants sought *en banc* review in separate motions which were denied. (Pet. App. A).

C. Jurisdictional Statement

Respondents claimed federal jurisdiction in the first instance under 28 U.S.C. §§ 1331 and 1343.

REASONS FOR GRANTING THE WRIT

I. CERTIORARI SHOULD BE GRANTED TO REMEDY THE SIXTH CIRCUIT'S DEPARTURE FROM THIS COURT'S EXPLICIT HOLDING IN *MONELL V. DEP'T OF SOC. SERVS.*

The Sixth Circuit's opinion directly conflicts with this Court's position regarding liability in matters brought under 42 U.S.C. § 1983. In reversing the district court's grant of summary judgment, the Sixth Circuit chose not to heed this Court's precedent established in *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 98 S. Ct.2018, 56 L.Ed. 2d 611 (1978). *Monell* makes it very clear that liability under the language of Section 1983 is intended to be personal, requiring a link between the act complained of and the individual or entity claimed to have been responsible. Liability under Section 1983 is based on active unconstitutional behavior. In short, *Monell* provides that before liability may attach to a governmental entity under Section 1983 for the deprivation of a constitutional right, it must be shown that the entity "caused" the deprivation, and further, that Congress, when

enacting Section 1983, did not intend for liability to attach where such causation is absent. *Id.* at 692.

In this matter, Respondents do not contest the lawfulness of the seizure of their property, the only act that engaged in by the Hamilton County Adult Probation Department. The constitutional deprivation claimed by Respondents is the destruction of their personal property by the City of Cincinnati, whether it happened at the cleanup sites or at some later time after it had been logged into the police property room. While it is certainly true that the county agreed to provide probation crews to the city for general litter and trash collection, it is wholly undisputed that the sites now at issue were chosen by the Cincinnati Police Department and the cleanups were accomplished under the direction of Cincinnati police officers.

Causation in this case, assuming that it exists at all, attaches only to the policies of the City of Cincinnati and not to the policies of the Hamilton County Department of Adult Probation and its Chief Probation Officer.

In placing the City of Cincinnati and the Petitioners on the same footing, the Sixth Circuit plainly ignored this Court's direction regarding personal liability under Section 1983.

II. CERTIORARI SHOULD BE GRANTED AS THE SIXTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF THE NINTH AND ELEVENTH CIRCUITS.

Other circuits dealing with issues related to the removal and destruction of personal property left by trespassers on public lands and have reached different results.

A. The Eleventh Circuit's Decision in *Church v. City of Huntsville*

The Sixth Circuit's decision conflicts with the ruling of the Eleventh Circuit Court of Appeals in *Church v. City of Huntsville*, 30 F.3d 1332, (11th Cir. 1994). *City of Huntsville* involved a suit brought by homeless residents against the city alleging that it had deprived them of various constitutional rights as part of a concerted effort to drive them out of the city. The homeless plaintiffs alleged *inter alia* that their Fourth and Fifth Amendment rights were violated by the City of Huntsville when the City assisted in the State of Alabama in the evicting them and removing their personal property from beneath bridges and overpasses. The plaintiffs sought declaratory and injunctive relief, as well as compensatory damages for loss of their property. Following a hearing, the district court preliminarily enjoined the city, its employees, and agents from implementing a policy of isolating or removing plaintiffs, harassing, intimidating, detaining, or arresting plaintiffs, and using the building or zoning codes to shut down or condemn buildings used by plaintiffs, solely because they were homeless. *Id.* at 1335. The Eleventh Circuit reversed the decision granting the injunction, finding that plaintiffs lacked standing to seek such relief and that they failed to show a substantial likelihood that a city policy or custom resulted in a deprivation of their constitutional rights under 42 U.S.C. § 1983. *Id.* at 1346.

In addition, the court specifically held that a city does not violate the constitutional rights of homeless persons trespassing on public land when it suggests and actively participates in an eviction pursued by another governmental agency. *Id.* at 1344-45. The Eleventh Circuit ruled that the eviction and removal of the homeless persons' property from State-owned lands was controlled by the State and the City's

assistance in that effort did not rise to the level of a constitutional violation. *Id.* at 1344 (The State "was responsible for removing the personal property and makeshift structures of the homeless from under the bridges. The State was also responsible for storing any personal items taken from under the bridges."). This conflicts with the Sixth Circuit's decision in this matter which essentially holds Department of Adult Probation responsible for activity performed, controlled, and directed by the City of Cincinnati occurring on access restricted, publicly-owned property over which the City has the affirmative responsibility under law to maintain free from nuisance. O.R.C. §§ 723.01 and 2744.02(B)(3). This ruling came despite the circuit court's specific recognition that ti appeared: "*the City* had a custom of destroying homeless individuals' property without notice or the right to reclaim the items taken" (Pet. App. at 10a)(Emphasis supplied.).

The Eleventh Circuit also ruled that the City of Huntsville could not be held liable despite "testimony that City police officers participated in the process of determining which property should be destroyed as unsanitary, and which property should be kept by the State to be reclaimed by the bridge people" without "evidence that this aspect of the police activity was authorized by a final policymaker." *Id.* at 1345 n. 6. This conflicts with the Sixth Circuit decision which held the Hamilton County Defendants liable for such conduct despite the lack of any evidence that this conduct was authorized by a final policymaker. (Pet. App. B).

Finally and importantly, the Eleventh Circuit ruled that even if the court were to impute to the City of Huntsville full responsibility for the removal of the homeless and their property, the court would not find that "such action is indicative of a City policy to violate the rights of the

homeless." *Id.* at 1345. This conclusion by the Eleventh Circuit is based on the Eleventh Circuit's refusal to construe the United States Constitution as conferring the right of trespass onto public lands or conferring the right to store personal belongings on public lands:

> The Constitution does not confer the right to trespass on public lands. Nor is there any constitutional right to store one's personal belongings on public lands. In this case, the property owner, the State of Alabama, authorized the removal of the homeless and their belongings from under the bridges and overpasses. It is irrelevant that the State made its decision at the request of the City and that City workers aided state employees in carrying out that decision.

City of Huntsville, 30 F.3d at 1345.

This decision is in accord with prior decisions of the United States Supreme Court determining that the Government has, with respect to its own lands the "rights of an ordinary proprietor to maintain its possession and prosecute trespassers . . . [and that it] is charged with the duty and clothed with the power to protect the public domain from trespass and unlawful appropriation." *Light v. United States,* 220 U.S. 523, 31 S.Ct. 485, 55 L.Ed. 570 (1911) (internal citations omitted); *Camfield v. United States,* 167 U.S. 518, 524, 17 S. Ct. 864, 42 L. Ed. 260 (the Government may deal with its lands precisely as a private individual may deal with his own); *see also: United States of America v. Ruckman,* 806 F.2d 1471, 1473 (1986), *citing: Utah Power and Light Co. v. United States,* 243 U.S. 389, 405, 37 S.Ct. 387, 61 L.Ed. 791, (1917)("A necessary ancillary to this regulatory power over lands within the public domain is the power to control their occupancy and use, to protect them from trespass and

injury . . .").The Eleventh Circuit's explicit ruling that no constitutional deprivation occurs when a governmental entity removes the homeless and their property from public lands directly contravenes the Sixth Circuit's answer to the threshold question they explicitly posed as to: "whether the interest at stake is within the Fourteenth Amendment's protection of liberty and property." (Pet. App. B at 7a), quoting *Arnett v. Myers*, 281 F.3d 552, 564 (6th Cir. 2002). The Sixth Circuit answered that question in the affirmative stating simply: "[t]here can be little doubt that the plaintiffs have a protected property interest in their own items of value." (Pet App. B at 7a).

The factual context of the *City of Huntsville* precisely mirrors the participation of the county probation crews in this matter. First, it is undisputed that the clean-up sites were chosen by the City of Cincinnati, the probation crews were directed to these locations by City police officers, and that police officers instructed the crews in what to collect and bag. Then, at the conclusion of the clean-up, the crews placed the bagged items onto City trucks and the participation of the probation crew was at an end. Finally, as Respondents have now acknowledged, any destruction of these removed items -- if it indeed occurred at all – was accomplished solely by the City of Cincinnati without any further involvement of the Department of Adult Probation.

The removal of Respondents' property is the only activity in which the Department of Adult Probation participated. The destruction of that property by the City of Cincinnati - assuming that it occurred and also rose to the level of a constitutional violation - is a separate, intervening act over which the department exercised no control. As such, the county Defendants have committed no violation of any

constitutional or federally recognized right of the Plaintiff-Appellants.

B. The Ninth Circuit's Decision in *Stone v. Agnos*

The Sixth Circuit decision also conflicts with a ruling of the Ninth Circuit Court of Appeal. In *Stone v. Agnos*, 960 F.2d 893 (9th Cir. 1992), the Ninth Circuit ruled that no liability attached to the mayor or police chief or city in connection with the confiscation and destruction of a homeless person's property. *Id.* at 895-896. The plaintiff in that case, a homeless person, sued the City and County of San Francisco as well as the mayor and police chief of that city arising from the seizure of personal property he had left on city-owned property as well as his arrest for refusing to leave the city-owned property. The plaintiff alleged *inter alia* that these defendants "deliberately and intentionally conspired to deprive him of liberty and property in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment." *Id.*, 960 F.2d at 895.

The Ninth Circuit stated that summary judgment adjudication in the defendants' favor was warranted. The Ninth Circuit differs with the decision of the Sixth Circuit in two areas. First, the Ninth Circuit ruled that the plaintiff was required to show that "taking of the property was unreasonable" before he could claim "that the destruction of his property violated the Fourteenth Amendment." *Id.* 960 F.2d at 895. Second, the Ninth Circuit ruled in *Stone* a homeless person must demonstrate that the a policymaker either effected the destruction of his property or authorized a policy to do so. *Id.* at 896.

On the other hand, the Sixth Circuit, without any analysis of reasonableness, summarily concluded that Respondents had sufficiently alleged a Fourteenth Amendment deprivation.

(Pet App. B at 7a). The Sixth Circuit was clearly aware of the different levels of culpability between the City and the Department of Adult Probation, and described the acts of both in some detail in concluding that there were issues of fact sufficient to reverse the district court's decision. (See Pet. App. B at 10a -11 a). In spite of this awareness, the circuit court simply lumped both agencies together and reversed the district court.

III. CONCLUSION

Issues associated with trespassers, homeless or not, along public highways in urban areas have evolved into a nationwide problem in recent years. The responsibility of addressing and resolving the important issues related to these trespassers and the by-products of their life-style choices, is almost always shouldered by the local governments having control and responsibility over the highways within their respective jurisdictions. In this case, the resolution was completed under the direction of Cincinnati police officers using manpower provided by probationers performing community service. Illegal campsites were located and persons present were notified and encouraged to remove their belongings. Unattended property was removed and allegedly destroyed.

The destruction of the removed property is the only harm claimed by Respondents during the proceedings below. Respondents specifically identified the City as the agency responsible for the alleged destruction of their property. Even so, the Sixth Circuit concluded that summary judgment for the Hamilton County Petitioners was inappropriate. It is clear that the circuit court treated the removal of property by

the County crews co-extensively with any later destruction that may have occurred at the hands of the City.

This Court should grant the writ of certiorari requested by the Hamilton county Department of Adult Probation and its Chief Probation Officer. The writ is necessary to reinforce the individual nature of Section 1983 liability and to resolve the clear conflict between the holding of the Sixth Circuit and the prior holdings of the Ninth and Eleventh Circuits.

Respectfully submitted,

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ATTORNEY FOR PETITIONERS

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 03-3916

[Filed, February 25, 2005]

GERALD CASH, ET AL.,	)
Plaintiffs-Appellants,	)
	)
v.	)
	)
HAMILTON COUNTY	)
DEPARTMENT OF ADULT	)
PROBATION, ET AL.,	)
Defendants-Appellees.	)
	)

ORDER

MERRITT, MOORE, and GILMAN, Circuit Judges.

The court having received two petitions for rehearing en banc, and the petitions having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petitions for rehearing have been referred to the original panel.

The panel has further reviewed the petitions for rehearing and concludes that the issues raised in the petitions were fully considered upon the original submission and decision of the case. Accordingly, the petitions are denied with the following two corrections to the opinion: page 3, line 2, change the word three to two; page 3, line 3, change the word two to three.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Filed, November 12, 2004]

No. 03-3916

GERALD CASH et al.,
Plaintiffs-Appellants,

v.

HAMILTON COUNTY DEPARTMENT OF ADULT PROBATION et al.,
Defendants-Appellees.

OPINION

RONALD LEE GILMAN, Circuit Judge. Homeless individuals in Cincinnati, Ohio brought suit pursuant to 42 U.S.C. § 1983 against the city and county, alleging that these entities had violated the plaintiffs' Fifth and Fourteenth Amendment rights to the due process of law by destroying their personal property without notice and without any right to reclaim the items taken. The district court granted summary judgment in favor of the defendants. For the reasons set forth below, we **REVERSE** the judgment of the district

court and **REMAND** the case for further proceedings consistent with this opinion.

I. BACKGROUND

A. Factual background

The City of Cincinnati pays Hamilton County to provide city cleanup services. Crews of individuals sentenced to community service and assigned to the Hamilton County Department of Adult Probation's Community Service Program, led by a field supervisor, provide litter collections and ground maintenance of city-owned lots. At issue in this case are the cleanup activities of these crews in areas where homeless individuals reside.

In October of 2001, Gerald Cash, a homeless man, was living under the Fifth Street Viaduct in Cincinnati with his wife, Clara Cash, and his friend, Rocky Wayne Adkisson. One day in mid-October of 2001, the Cashes returned to their living space and found a group of people from the Community Service Program taking away their property. When Gerald Cash asked for his property to be returned, the work crew supervisor allegedly told him: "I'm not allowed to; we have been given orders to clear out under all the bridges."

The Cashes and Adkisson made efforts to locate their property, but were unsuccessful. Clara Cash stated in an affidavit that she called the City of Cincinnati's Sanitation Division and, although she was told that her property would be held for 30 days, she was not told where it was located. Molly Lyons, an organizer with the Greater Cincinnati Coalition for the Homeless, also tried to locate the property that was taken from under the Fifth Street Viaduct. Lyons

said that she called the Sheriff's Office and was told that "the stuff from the homeless sites is thrown away."

B. Procedural background

Five homeless individuals--Gerald Cash, Clara Cash, Rocky Wayne Adkisson, Phillip Garcia, and Gregory B. Wahoff--filed suit against the Hamilton County Department of Adult Probation, the Chief Probation Officer for the Department, and the City of Cincinnati (hereafter referred to collectively as the City and County) in October of 2001. Two of the five plaintiffs have since died. The remaining three (hereinafter the plaintiffs) continue with this suit.

The plaintiffs sought actual damages and injunctive relief, claiming that the City and County violated their Fifth and Fourteenth Amendment rights by destroying their property without affording them the due process of law. They also sought a preliminary injunction requiring the City and County to cease and desist from their alleged practice of seizing and confiscating the property of homeless citizens without notice and a hearing. Subsequently, however, the plaintiffs explicitly stated that they no longer contest the City's authority to remove personal property from municipally-owned areas. They acknowledge in their brief that "it is the *destruction* of property without notice and a hearing which is at the heart of Plaintiff's case." (Emphasis in original.)

In May of 2002, the City and County moved for summary judgment. The district court, a little over a year later, granted these motions and denied the plaintiffs' motion for a preliminary injunction. This appeal followed.

II. ANALYSIS

A. Standard of review

We review a district court's grant of summary judgment de novo. *Therma-Scan, Inc. v. Thermoscan, Inc.*, 295 F.3d 623, 629 (6th Cir. 2002). Summary judgment is proper where there exists no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). In considering a motion for summary judgment, the district court must construe all reasonable inferences in favor of the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986). The central issue is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986).

B. The alleged constitutional violations of the City and County

The plaintiffs brought suit against the City and County under 42 U.S.C. § 1983, which provides in pertinent part as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to

> the party injured in an action at law, suit in equity, or other proper proceeding for redress[.]

"Section 1983 does not itself create any constitutional rights; it creates a right of action for the vindication of constitutional guarantees found elsewhere." *Braley v. City of Pontiac,* 906 F.2d 220, 223 (6th Cir. 1990). The plaintiffs allege that the City and County violated their Fifth and Fourteenth Amendment rights to the due process of law by destroying their personal property without notice and without the right to reclaim the items taken.

This court engages in a two-pronged inquiry when considering a municipal-liability claim. *Doe v. Claiborne County,* 103 F.3d 495, 505 (6th Cir. 1996). First, the court must determine whether the plaintiffs have asserted the deprivation of a constitutional right. *Id.* at 505-06. If so, the court must then decide whether the City and County are responsible for that deprivation. *Id.* at 507.

The threshold question is "whether the interest at stake is within the Fourteenth Amendment's protection of liberty and property." *See Arnett v. Myers,* 281 F.3d 552, 564 (6th Cir. 2002) (discussing whether hunters had a constitutionally-protected interest in their duck blinds). There can be little doubt that the plaintiffs have a protected property interest in their own items of value. *See Harris v. City of Akron,* 20 F.3d 1396, 1401 (6th Cir. 1994) ("Generally, the process that is due before the state may deprive an owner of property includes notice to the owner prior to the deprivation and an opportunity for a predeprivation hearing.").

We must next decide if a genuine issue of material fact exists as to whether the City and County are responsible for the alleged due process violation. Because *respondeat*

superior liability is not available as a means of recovery under § 1983, *Doe,* 103 F.3d at 507, the plaintiffs cannot base their claims against the City and County solely on the conduct of the workers who effected the sweep of homeless areas. *See Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978) (holding "that a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents"). The plaintiffs must demonstrate that the City and County are themselves the wrongdoers. *Id.*

Municipalities and other bodies of local government may be sued pursuant to 42 U.S.C. § 1983 if they are "alleged to have caused a constitutional tort through 'a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers.'" *City of St. Louis v. Praprotnik,* 485 U.S. 112, 121, 99 L. Ed. 2d 107, 108 S. Ct. 915 (1988) (citing *Monell,* 436 U.S. at 690). Section 1983 also "authorizes suit 'for constitutional deprivations visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decision making channels.'" *Id.* (citing *Monell,* 436 U.S. at 690-91). Although a § 1983 plaintiff might not be able to demonstrate that a written policy exists, he or she "may be able to prove the existence of a widespread practice that, although not authorized by written law or express municipal policy, is so permanent and well settled as to constitute a custom or usage with the force of law." *Monell,* 436 U.S. at 691. (citation and quotation marks omitted).

This court has explained that a "custom" for the purposes of § 1983 liability

> must be so permanent and well settled as to constitute a custom or usage with the force of law. In turn, the

> notion of 'law' must include deeply embedded traditional ways of carrying out state policy. It must reflect a course of action deliberately chosen from among various alternatives. In short, a 'custom' is a 'legal institution' not memorialized by written law.

Doe, 103 F.3d at 507-08 (citations and quotation marks omitted). Not only must the plaintiffs show that the City and County as entities caused the constitutional violation, but they "must also show a direct causal link between the custom and the constitutional deprivation." *Id.* at 508. "This requirement is necessary to avoid de facto respondeat superior liability explicitly prohibited by Monell." *Id.*

The district court relied exclusively on "the undisputed testimony from the supervising police officers [who stated] that the probationers are instructed to separate personal belongings from trash. Personal belongings are then inventoried in the police property room where they are held, according to one police officer, for one year before they are thrown away." From this "undisputed evidence," the district court reasoned that any destruction of the plaintiffs' property that occurred at the homeless site "would be unauthorized because the probationers are instructed to separate personal belongings from trash."

The district court based its holding on the United States Supreme Court's decisions in *Parratt v. Taylor*, 451 U.S. 527, 68 L. Ed. 2d 420, 101 S. Ct. 1908 (1981), and *Hudson v. Palmer*, 468 U.S. 517, 82 L. Ed. 2d 393, 104 S. Ct. 3194 (1984), which stand for the proposition that unauthorized deprivations of property by the state are not violations of due process so long as postdeprivation remedies are available. Concluding that any destruction of the plaintiffs' property would have been unauthorized, given the purported practice

of preserving items of value, the court held that no due process violation occurred. The plaintiffs, in other words, were free to sue the City and County after-the-fact either for replevin (to get their property back) or for money damages.

Contrary to the declaration of the district court that the supervising police officers' testimony was "undisputed," the plaintiffs presented substantial evidence suggesting that the City and County had a custom and practice of hauling to the dump all unattended property found at the sites in question. Jeffrey Smith, Field Supervisor for the Hamilton County Adult Probation Department, testified that he had been accompanying adult probationers sentenced to community service on cleanup jobs for ten years. Smith explained that he and his work crews "just follow the Cincinnati Police, and they direct us where to go, and they direct the probationers what to clear and how to do it."

In fact, Smith stated that he is not even present in the immediate area where the cleanup takes place. "I never go up [to] an area," Smith asserted, "I just stay down below and let the officer direct accordingly." Smith testified that the standard cleanup procedure was that a Cincinnati police officer would direct the probationers to put all of the items in bags and then place the bags into a sanitation truck. In direct opposition to the testimony that the district court relied upon, Smith testified that he never observed a Cincinnati police officer segregating any of the items and saying that some should be saved. Smith stated that the items are all "hauled off to the trash, to the dump."

Testimony from Cincinnati Police Officer Thomas J. Branigan also supports the plaintiffs' contention that the City had a custom of destroying homeless individuals' property without notice or the right to reclaim the items taken.

Branigan testified that he was present for three days of cleanup in mid-October of 2001. The cleanup process, according to Branigan, is swift and indiscriminate. He explained that the probationers "don't rake the property down to get it to a fine clean. They don't use shovels; whatever they put in their hands, put in the bag, and pass it down." Branigan distinguished this procedure in dealing with the homeless from the Police Department's general policy for dealing with personal property found at other locations around the city. In Fountain Square, for example, any unattended property is taken back to the police station, logged, and held as found property. If someone can prove that the property is theirs within "the proper amount of time," the property is returned to that person.

Testimony contrary to that of Smith and Branigan was presented by the City and County. For the purpose of summary judgment, however, all of the evidence must be construed in favor of the plaintiffs as the nonmoving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986). In short, a genuine issue of material fact exists as to whether the property of homeless persons like the plaintiffs was being discarded as part of the City's official policy. The district court therefore erred in granting summary judgment to the City and County on the basis that the relevant testimony was uncontested.

A genuine issue of material fact also exists over whether adequate notice was provided to homeless individuals like the plaintiffs. The established precedent is that individuals whose property interests are at stake are entitled to a "notice and opportunity to be heard." *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 48, 126 L. Ed. 2d 490, 114 S. Ct. 492 (1993). The key inquiry in such circumstances is whether

the notice is "reasonably calculated, in all the circumstances, to appraise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 94 L. Ed. 865, 70 S. Ct. 652 (1953). The City submits that it published a notice in the local newspaper, which was available for anyone in the Cincinnati area to pick up and read. By contrast, the plaintiffs contend that such a notice is per se insufficient, particularly when the educational and financial restraints of the homeless community are considered. This is an issue for the district court to resolve on remand.

C. Ripeness

As part of its defense, City argues that the plaintiffs' Fifth Amendment takings claim is not ripe because the plaintiffs did not pursue adequate state procedures for seeking compensation for the alleged taking. The City contends, therefore, that this claim must be dismissed for lack of subject matter jurisdiction. The plaintiffs, however, have abandoned their Fifth Amendment takings claim and are relying solely on the Fourteenth Amendment as the legal basis for their lawsuit. We therefore have no need to address the ripeness issue.

D. Hamilton County's Eleventh Amendment immunity argument

The County argues that it is entitled to Eleventh Amendment immunity from suit because the Hamilton County Department of Adult Probation is an arm of the common pleas and municipal courts of the state of Ohio. To support this contention, the County cites a number of Ohio statutes. *See* O.R.C. § 2301.27(A)(1) ("The court of common pleas may establish a county department of probation."); § 1901.33(A)

("The judge or judges of a municipal court may appoint one or more . . . probation officers. . . . Probation officers have all the powers of regular police officers and shall perform any duties that are designated by the judge or judges of the court."); § 1901.33(B) ("If a municipal court appoints one or more probation officers, those officers shall constitute the municipal court department of probation unless the court designates other employees as the department of probation for the court.").

The bald assertion that the Department is an arm of the common pleas and municipal courts is insufficient by itself to garner Eleventh Amendment immunity. *See Alkire v. Irving,* 330 F.3d 802, 811 (6th Cir. 2003) (rejecting a per se rule granting Eleventh Amendment immunity to county courts). Rather, this argument is one of many factors that must be considered by the district court. We have recognized that the most important factor is "will a State pay if the defendant loses?" *Brotherton v. Cleveland,* 173 F.3d 552, 560 (6th Cir. 1999). In *Brotherton,* this court considered whether a county coroner enjoyed Eleventh Amendment immunity. We concluded that "because Hamilton County--rather than the State of Ohio--would satisfy any money judgment against its county coroner, the case does not implicate the Eleventh Amendment." *Id.* at 563; *see also S.J. v. Hamilton County,* 374 F.3d 416, 420-21 (6th Cir. 2004) (rejecting sovereign immunity for a juvenile training facility and noting that the "emphasis on 'who pays' is substantial"); *Alkire,* 330 F.3d at 811 ("We now recognize that the question of who pays a damage judgment against an entity as the most important factor in arm-of-the-state analysis, though it is unclear whether it is the only factor or merely the principal one.").

The County raised the issue of Eleventh Amendment immunity in its motion for summary judgment. Although the

district court granted the County's motion, the order provides no findings or analysis pertaining to the Eleventh Amendment. A final resolution of this issue will turn on factual findings regarding whether the Department of Adult Probation is part of the Ohio court system and whether the State or the County would pay damages for a constitutional violation perpetrated by the Department. We therefore remand this issue to the district court for further development.

III. CONCLUSION

For all of the reasons set forth above, we **REVERSE** the judgment of the district court and **REMAND** the case for further proceedings consistent with this opinion.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION, CINCINNATI

Case No. C-1-01-753

[Filed June 24, 2003]

Gerald Cash, et al.	)
Plaintiffs,	)
	)
v.	)
	)
Hamilton County Department	)
of Adult Probation, et al.,	)
Defendants.	)
	)

JUDGMENT IN A CIVIL CASE

This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION [DOC. 2] IS DENIED

DEFENDANTS' RESPECTIVE MOTIONS FOR SUMMARY JUDGMENT [DOCS. 24 & 25] ARE **GRANTED**

AND THIS CASE IS CLOSED PURSUANT TO ORDER OF THE COURT [DOC. 35]

JUNE 24, 2003

KENNETH J. MURPHY
Clerk

/s/
(By) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. C-1-01-753

[Filed June 24, 2003]

Gerald Cash, et al.	)
Plaintiffs,	)
	)
v.	)
	)
Hamilton County Department	)
of Adult Probation, et al.,	)
Defendants.	)
	)

ORDER

This matter is before the Court on a motion for a preliminary injunction (Doc. No. 2) filed by Plaintiffs Gerald Cash, Clara Cash, Gregory Wahoof, Phillip Garcia, and Rocky Wayne Addison, and motions for summary judgment filed by Defendants City of Cincinnati (Doc. No. 24) and Hamilton County Department of Adult Probation and Michael Walton (Doc. No. 2S). For the reasons which follow, plaintiffs' motion for a preliminary injunction is not well-taken and is DENIED; Defendants' respective motions for summary judgment are well-taken and are GRANTED.

I. Background

Plaintiffs in this case are homeless persons who live and keep such possessions as they have underneath bridges and overpasses throughout The City of Cincinnati *See* Amended Complaint ¶¶ 3, g, 10. The Defendants are the City of Cincinnati, a municipal corporation organized under the laws of the state of Ohio, the Hamilton County Adult Probation Department, an agency of Hamilton County, Ohio charged with supervising persons convicted of crimes, and Michael Walton, chief of the Adult Probation Department. *Id.* ¶¶ 4, 5

The amended complaint contends that the City of Cincinnati and the Adult Probation Department have an agreement wherein the Adult Probation Department provides to the City probationers who have community service obligations. These probationers are then put to work by the City. According to the amended complaint, the City has been using the probationers, under the supervision of a police officer, to conduct "raids" on their bivouac areas when they are absent. The amended complaint alleges that during these "raids," the City confiscates or disposes of their belongings, which mostly consist of clothes, medicine, and small personal effects.

While the City and the Adult Probation Department admit they entered into the agreement as alleged, and that the City conducts clean-up operations in and around these bridges and overpasses, the undisputed testimony from the supervising police officers is that the probationers are instructed to separate personal belongings from trash. Personal belongings are then inventoried in the police property room where they are held, according to one police officer, for one year before they are thrown away. Doc. No. 25, Ex. Boerlein Dep., at 13.

On November 1, 2001, Plaintiffs filed an amended complaint for a preliminary and permanent injunction against the City and the Adult Probation department pursuant to 42 U.S.C. 1983. The amended complaint alleges that Defendants' conduct, raiding their encampments, and seizing and disposing of their things without notice or hearing, violates their rights under the Fourth, Fifth, and Fourteenth Amendments. Although the amended complaint appears to challenge the actual seizure of property, in their response to Defendants' motions for summary judgment, Plaintiffs, who have admitted they were trespassers on the areas in question, state that their claims are limited to the following contention:

> Plaintiffs do not contend that Defendants had to conduct a hearing before they removed Plaintiffs' possessions from public land. However, it is plain that before the City *destroyed* the property it could have and should have, pursuant to Constitutional mandates, conducted a hearing.

Doc. No. 26, at 1. (emphasis in original). Therefore, as the court understands it, Plaintiffs have withdrawn any challenge to the actual practice of conducting the "raids" and now confine their constitutional claims to the alleged destruction of their property without notice and a hearing.

II. Summary Judgment Standard of Review

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter, of law." Fed. R. Civ. P. 56 (c) . The evidence presented on a motion for summary judgment is construed in the light most favorable to the non-

moving party, who is given the benefit of all favorable inferences that can be drawn therefrom. *United States v. Diebold,* Inc., 369 U.S. 654 (1962). "The mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby Inc.* 477 U.S. 242, 248 (1986)(emphasis in original). The Court will not grant summary judgment unless it is clear that a trial is unnecessary. The threshold inquiry to determine whether there is a need for trial is whether "there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson,* 477 U.S. at 250. There is no issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party. *Id.*

The fact that the weight of the evidence favors the moving party does not authorize the court to grant summary judgment. *Poller v. Columbia Broadcasting System, Inc.,* 368 U.S. 464, 472 (1962) . " [T]he issue of material fact required by Rule 56(c)...to entitle a party to proceed to trial is not required to be resolved conclusively in favor of the party asserting its existence; rather, all that is required is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or a judge to resolve the parties' differing versions of the truth at trial." *First Natinal Bank v. Cities Service Co.*, 391 U.S. 253, 288-89 (1968) .

Moreover, although summary judgment must be used with extreme caution since it operates to deny a litigant his day in court, *Smith v. Hudson* 600 F.2d 60, 63 (6th Cir.) , *Cert. dismissed,* 444 U.S. 986 (1979) the United States Supreme Court has stated that the "[s]ummary' judgment procedure is properly regarded not as a disfavored procedural shortcut, but

rather as an integral part of the Federal Rules as a whole, which are designed to 'secure the just, speedy and inexpensive determination of every action." *Celotex Corp. v. Catrett* 477 U.S. 317, 327 (1986). According to the Supreme court, the standard for granting summary judgment mirrors the standard for a directed verdict, and thus summary judgment is appropriate if the moving party establishes that there is insufficient evidence favoring the non-moving party for a jury to return a verdict for that party. *Id.* at 323; *Anderson*, 477 U.S. at 250.

Accordingly, summary judgment is clearly proper "against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case and on which that party will bear the burden of proof at trial." *Celotex Corp.*, 477 U.S. at 322, Significantly, the Supreme Court also instructs that the "the plain language of Rule 56(e) mandates the entry of summary judgment, after adequate time for discovery and upon motion" against a party who fails to make that showing with significantly probative evidence, *Id.; Anderson*, 477 U.S. at 250. Rule 56(e) requires the non-moving party to go beyond the pleadings and designate "specific facts showing that there is a genuine issue for trial." *Id.*

Further, there is no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or similar materials negating the opponent's claim. *Id.* Rule 56 (a) and (b) provide that parties may move for summary judgment "with or without supporting affidavits." Accordingly, where the non-moving party will bear the burden of proof at trial on a dispositive issue, summary judgment may be appropriate based solely on the pleadings, depositions, answers to interrogatories, and admissions on file.

III. Analysis

It is clear to the court that on the facts of this case, even viewed in the light most favorable to Plaintiffs, there was no due process violation committed when the police allegedly disposed of their things without notice or a hearing. The Court discerns two discrete instances when Plaintiffs' property could have been disposed of without notice - at the actual location where the cleanup occurred or after being held in the property room by the police, department.

In the former situation, Plaintiffs' due process rights are governed by the U.S. Supreme Court's decisions in *Parratt v. Taylor*, 451 U.S. 527 (1981), and *Hudson v. Palmer* 468 U.S. 517 (1984).These cases collectively hold that there is no due process violation for the random unauthorized, destruction of personal property, whether negligently or intentionally done, if there are adequate post-depravation, remedies available to the plaintiff. In this case, it is undisputed that the City's intent is not to destroy Plaintiffs' things, but rather to remove them from areas where they do not belong. Any on-the-scene destruction of Plaintiffs' personal property would be unauthorized because the probationers are instructed to separate personal belongings from trash. Any deviation from these instructions by the probationers, whether done negligently because the probationer was not able to distinguish between property and trash, or whether done intentionally by the probationer, would certainly be a random, unforeseeable occurrence with respect to any individual item. *See Zinermon v. Burch, 494 U.S. 113, 136 (1990)* (holding the rule in *Parrat* and *Hudson* applies when the deprivation is unpredictable). Moreover, in this situation, Plaintiffs have adequate state post-deprivation remedies available for property withheld or destroyed in the form of a replevin action against the City and/or County. *E.g., Bernard v. City*

Of Lakewood, 747 N.E.2d 838 (Ohio Ct. App. 2000) (replevin action against city for return of gun collection confiscated by police) ; *State ex rel Jividen v. Toledo Police Dept.*, 679 N.E.2d 34 (Ohio Ct. App. 1996)(stating the proper method to compel return of property wrongfully held is to file a replevin action); *see* 19 Ohio Jur. 3d Conversion & Replevin § 110 (" [I]f the defendant no longer has possession of the property, the replevin action will proceed as one for damages only,") Thus, because in the on-site context, any destruction of Plaintiffs' property would be random and unforeseeable, and because Plaintiffs have available adequate post-deprivation remedies, Plaintiffs have failed to state a claim for violation of due process.

The second question is, once the police have taken Plaintiff's property and have moved it to the property room for storage, what notice, if any, are Plaintiffs due before their belongings are disposed of? Before attempting to answer this question, however, the Court notes that it is debatable whether Plaintiffs have created an issue of material fact that the City has destroyed the property that was removed from their campsites. Only a cursory comparison between the items listed as being taken in the amended complaint and the items logged into the police property room at the relevant time indicates that there is a substantial overlap between the two lists, *Compare* Amended Complaint ¶¶ 8-11, *with* Doc. No. 26, Newman Aff. Ex. 1 (Property Room Inventory Log from October 2001)[1] In other words, there are many things

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[1] For instance, among the items the amended complaint alleges were seized or destroyed by the police were the following: Nike gym shoes, a backpack, jeans, a sleeping bag, boots, a folding chair, a cell phone, cash, a camera, a bible, medication, toiletries, clothes, compact discs, and photographs. The police inventory log

listed on the police inventory sheet which could be the items Plaintiffs now claim were destroyed. Since Plaintiffs have apparently never taken the time to go to the police department to attempt to identify and/or reclaim their belongings, there is a substantial question as to whether Plaintiffs have carried their burden of demonstrating an actual deprivation of property at the hands of the City.

The Court will assume for the moment, however, that Plaintiffs' belongings were destroyed as they claim. The Due Process Clause requires that notice be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). Notice by publication is generally inadequate under the Due Process Clause where the property owner is known to the government or where his name and address are readily ascertainable. *Mennonite bd. Of Missions v. Adams*, 462 U.S. 791, 797 (1983). The inverse of this statement is that notice by publication is sufficient where the property owner is not known to government or where his name and address are not readily ascertainable.

In this case, Plaintiffs, as homeless persons, are by definition not readily identified or located by government officials. They have no fixed location where they might be

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shows that the following items were logged into the property room: 6 cell phones, personal papers, 4 photos, benadryl capsules, compact discs, blue jeans, a coat, a jacket, shoes, t-shirts, duffle bags, blankets, various clothing items, avalide tablets, assorted amounts of cash, on disposable camera, one pair of black Nike shoes, and a red and black metal chair.

readily found by the government or to where specific notice might be sent or posted. The items collected by the police, department are mostly generic things, such as clothes, which do not lend themselves to being traced back to the owner. Therefore, the Court finds that notice by publication is sufficient, under the circumstances of this case, to apprise Plaintiffs of the disposition of their belongings.

The City's procedures for disposing of unclaimed property are governed by either Ohio Revised Code § 737.29, *et seq.* or Ohio Rev. Code § 2933. Regarding notice, § 737.32 provides:

> Except as otherwise provided in this section and unless the property involved is required to be disposed of pursuant to another section of the Revised Code, property that is unclaimed for ninety days or more shall be sold by the chief of police of the municipal corporation, marshal of the village, or licensed auctioneer at public auction, after notice of the sale has been provided by publication once a week for three successive weeks in a newspaper of general circulation in the county.

Ohio Rev. Code § 737.32. Section 2933.41 controls disposition of lost, abandoned, or confiscated property in the custody of a law enforcement agency, and provides:

> A law enforcement agency that has property in its possession that is required to be disposed of pursuant to this section shall make a reasonable effort to locate the persons entitled to possession of the property in its custody, to notify them of when and where it may be claimed, and to return the property to them at the earliest possible time. In the absence of evidence

> identifying, persons entitled to possession, it is sufficient notice to advertise in a newspaper of general circulation in the county, briefly describing the nature of the property in custody and inviting persons to view and establish their right to it.

Ohio Rev. code § 2933.41(B). In fact, the City's procedures for disposition of "found property" specifically incorporate §§ 737.29 (and by implication § 737.32)[2] and 2933.41. *See* Doc. No. 24, Ex. E, at § D2. As can be seen, both of these statutes require notice by publication in local newspapers before property in the custody of the City or the police department can be disposed of. As these sections pertain here, they satisfy the requirements of due process because notice by publication is the only reasonable means to make these particular Plaintiffs aware that their belongings are about to be discarded or liquidated.

In this case, Plaintiffs bear the burden of demonstrating that the Defendants abridged a property interest without the appropriate process. *LRL Properties v. Portage Metro Housing Auth.* 55 F.3d 1097, 1108 (6th Cir. 1995). As noted above, whether Plaintiffs have even made a prima facie showing of a deprivation is doubtful. Although Plaintiffs have shown that they made a few inquiries about their things and perhaps got the run around, even a cursory review of the police property log reveals that their things were most likely received into the property room. All they had do was go down to the property room to identify and reclaim their possessions. In any event, Plaintiffs have not demonstrated or

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[2] See *United States v. Stauffer Chem. Co.*, 684 F. 2d 1174, 1184 (6th Cir. 1982)(stating all provisions of a statute should be read *in pari materia*).

raised any issue of fact that the city or the police failed to follow the procedures outlined above, which the Court has found satisfy due process, if in fact their possessions were liquidated. Thus, Plaintiffs have failed to show that Defendants committed any due process violation.

Conclusion

In conclusion, under the circumstances of this case, any on-site destruction of plaintiffs' belongings was an unauthorized, random, and unforeseeable event for which the state has provided an adequate post-deprivation remedy. Therefore, Plaintiffs have failed to state a claim for a due process violation with regard to the alleged on-site disposition of their property. With regard to items actually taken into custody, the notice by publication procedures for disposition of this property comport with due process because the names and addresses of Plaintiffs are not readily ascertainable by the government. Moreover, Plaintiffs have not demonstrated that Defendants failed to follow these procedures if in fact their belongings were disposed of. Accordingly, Defendants' respective motions for summary judgment are well-taken and are GRANTED. Plaintiffs' motion for a preliminary injunction is not well-taken and is DENIED. THIS CASE IS CLOSED.

IT IS SO ORDERED

Date: 6/19/03

/s/
Sandra S. Beckwith
United States District Judge

(2)

UNITED STATES SUPREME COURT

CITY OF CINCINNATI,	:	Case No. 04-1631
Petitioner,	:	
v.	:	BRIEF IN OPPOSITION TO *CERTIORARI*[1]
GERALD CASH, et al.,	:	
Respondents.	:	

COUNTERSTATEMENT OF THE CASE

The cleanup activities which are the subject of this lawsuit took place on property belonging to the Ohio Department of Transportation ("ODOT"). The Hamilton County Department of Adult Probation supplies cleanup services to ODOT in exchange for compensation. While Hamilton County has not joined in this Petition, it argued in its brief to the Court of Appeals that "any policy of the adult probation department, if one in fact existed, was to go where directed by the City of Cincinnati . . . . Neither the adult probation department nor the County were the 'moving force' behind either the removal or alleged destruction of appellants' property." The deposition testimony was virtually uniform in backing up this position, and the Petition

[1] The other Defendant in this case, the City of Cincinnati, filed a separate petition for certiorari in Case No. 04-1569.

does not appear to deny the City's direct involvement in the cleaning up of homeless sites.[2]

In October of 2001, Respondents were living under the Fifth Street Viaduct in Cincinnati. They had been living there on and off for ten years. One day they returned to their living space and found that Hamilton County adult probationers had taken Respondent Cash's bedroll and put it on the back of a truck. Mr. Cash asked the men to give his property back but was told by the supervisor, "I'm not allowed to; we have been given orders to clear out under all the bridges." (App. 4)

Respondents stayed under the bridge that night. The next morning they went to the City Gospel Mission for breakfast. They returned to the bridge the same afternoon and again saw Hamilton County cleanup personnel. Respondents objected to anything being taken and the probationers left. When Respondents returned in the evening, everything they had was gone, including clothing, boots, a Bible, a family portrait, electric blankets, reading glasses, sleeping bags, medication, shampoo, and many other personal items and items of clothing.

Respondents never received notice of where their property was taken or how to get it back. They called the sanitation division but could find out

[2] The Court of Appeals put it as follows: "The City of Cincinnati pays Hamilton County to provide City clean up services." (App. 4)

nothing. An organizer with the Greater Cincinnati Coalition for the Homeless called Cincinnati Public Services, who said that "solid waste" would be with the police. The Sheriff's office told her that "the stuff from the homeless sites is thrown away." (App. 2-3) She spoke to an officer in the Cincinnati Police Division about whether anything had been received from under the bridges; he said it had not. Another officer disclaimed any Police Division responsibility for sweeps of property of homeless people. No one told the organizer where or when any hearing might take place. The Homeless Coalition gave Respondents blankets and clothing.

A Cincinnati police officer provided Respondents with a printed inventory of all property received by his unit in the month of October, 2001. None of Respondents' property appeared on it. Discovery uncovered no evidence of any notice of hearing, whether by publication, mail, posted notice or otherwise, and whether before or after the seizure of Respondents' property. Petitioner offered no affidavit or other testimony indicating that either notice or a hearing are provided with respect to the property of homeless persons in general, or that they had provided any such notice or hearing with respect to the property taken in this case. Deposition testimony was virtually unanimous that City policy is to "put all of the items in bags and then place the bags into a sanitation truck." (App. 8)

THERE IS NO REASON TO GRANT THE WRIT

Neither the trial court nor the Sixth Circuit panel made a final determination that the County acted wrongly. The only holding below that impacts Hamilton County is that it is not entitled to judgment as a matter of law with regard to the question of its policy of destroying property of homeless persons without notice. Without a factual determination of this issue, *certiorari* would appear premature, even if there were a genuine conflict or some other reason to grant the writ. In any case, there is no conflict on any legal point.

I. THE SIXTH CIRCUIT DID NOT PERMIT RESPONDEAT SUPERIOR LIABILITY AGAINST HAMILTON COUNTY.

Petitioner correctly states (Pet. 10-11) that, to be held liable under 42 U.S.C. § 1983, Hamilton County must be shown to have caused the deprivation of Respondents' property rights. Hamilton County attempts to evade liability (which has not yet been established in any event) by stating that "it is wholly undisputed that the sites now at issue were chosen by the Cincinnati Police Department and the cleanups were accomplished under the direction of Cincinnati police officers." (Pet. 11) However, that is still an open question, since the district court held as a matter of law that neither the County nor the City had any policy of destruction, while the Court of

Appeals reversed and sent that issue back for trial. (App. 11)[3] In short, no court has yet issued a holding which implicates *Monell v. Department of Soc. Services*, 436 U.S. 658 (1978)

II. THERE IS NO CONFLICT AMONG THE CIRCUITS.

Similarly, the asserted conflict with two other circuits concerning the right to destroy private property without a hearing (Pet. 11-17) does not exist. In *Church v. City of Huntsville*, 30 F.3d 1332 (11th Cir. 1994), homeless individuals primarily sought an injunction against what they described as "a concerted effort to drive them out of the city." *Id.* at 1335. They also requested damages for "loss of property." *Id.* "There was some testimony that City police officers participated in the process of determining which property should be destroyed as unsanitary, and which property should be kept by the State to be reclaimed by the bridge people. However, there . . . [was] no evidence that this aspect of the police activity was authorized by a final policymaker." *Id.* at 1345, n. 6. In addition, "The plaintiffs allege a constitutional violation in the failure to return to the homeless any personal belongings that were removed but not destroyed, but

[3] The Court of Appeals used the phrase, "the City's official policy," rather than "the official policy of the City or the County." Hamilton County apparently believes this was a judicial determination that it did not have a policy of destruction, and therefore cannot be held liable regardless of what happens on remand. However, it is doubtful that the characterization by the Sixth Circuit constitutes such a holding, and the City and the County will surely be blaming each other all the way through closing argument. There is no reason for the Court to try and resolve this factual issue.

the uncontroverted evidence at the hearing was that these items are, and have always been, in the possession of the State, not the City." *Id.* Thus, the Eleventh Circuit never reached the issue of whether property of homeless citizens may be destroyed without due process.

Stone v. Agnos, 960 F.2d 893 (9th Cir. 1992), was primarily a First Amendment case asserting the right to sleep in a public plaza. As to the alleged destruction of the plaintiff's property, his claim against the individual officers failed for lack of any evidence of unreasonable destruction, *id.* at 895, while his claim against the municipality failed because he had conceded that the destruction "was contrary to city policy." *Id.* at 896. This holding cannot be considered in conflict with the decision below, which returned the case to the district court for a decision by the trier of fact regarding the policy of destruction of property. Petitioner has not cited a single authority for the proposition that a municipality may destroy the property of individuals, whether or not they have homes, without providing some pre-destruction process.

CONCLUSION

For the foregoing reasons, the City of Cincinnati's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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ATTORNEYS FOR
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CERTIFICATE

I, Stephen R. Felson, do hereby swear or declare that on this date, September 12, 2005, as required by Supreme Court Rule 29 I have served the enclosed Motion for Leave to Proceed *In Forma Pauperis* and Brief in Opposition to Certiorari on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

The names and addresses of those served are as follows: David T. Stevenson, 230 E. Ninth St., Suite 4000, Cincinnati, Ohio, 45202.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 12, 2005.

Stephen R. Felson